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No. 84-716

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ARKANSAS LOUISIANA GAS COMPANY,
A DIVISION OF ARKLA, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

I. The Commission Cannot Through Issuance of a Regulation Legislate Authority to Order Refunds Below the Pre-Existing Rate Level When That Authority Has Been Denied to It by the Natural Gas Act

In their briefs in opposition, the Federal Energy Regulatory Commission ("Commission") and the City of Winfield, Kansas, ("Winfield") do not come to grips with the pivotal issue raised by Arkansas Louisiana Gas Company ("Arkla"). The Commission argues that it correctly interpreted an ambiguous regulation (Com. Br. 5-8), contending that 18 C.F.R. 154.38(d)(4)(vi)(c) gives it the power to order refunds below the level of the rate previ-

ously in effect. But that argument does not reach the controlling issue, namely that, even assuming the Commission's interpretation were correct,[1] the Commission cannot aggrandize its statutory authority through issuance of a regulation.[2] Nowhere do the Commission or Winfield deal with that central concept or deny its validity.

Arkla's position, clearly stated in its petition, is that the Commission has no statutory authority under Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. § 717c and § 717d ("Act"), to order refunds in amounts greater than the proposed increase, *FPC v. Sunray DX Oil Co.*, 391 U.S. 9 (1968) (Pet. 10-13), and that the Commission cannot legislate that power through issuance of a regulation. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) (Pet. 13-16). See also Pet. Questions Presented. The Commission argues only that its purchased gas cost (PGA) regulation should be interpreted to provide it with authority to order retroactive refunds below the last firm rate and that its interpretation of its regulation is entitled to deference. (Br. 8). Notably, the Commission does not dispute the statutory limitation of Sections 4 and 5 of the Act as elucidated in *Sunray*, but argues that its authority derives from its regulations. Conspicuous by its absence is any attempt by the Commission or Winfield to justify a regulation that exceeds the limits of Sections 4 and 5 of the Act.

The undisputed facts are that Arkla filed for an increase of only 9.52 cents per Mcf, and the Commission suspended that increased amount only. The 90.62 cents per Mcf in PGA increases that had been filed over the previous three years had been scrutinized and permitted

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[1] Arkla has shown that the Commission's interpretation is erroneous, for the regulation, properly interpreted, is consistent with the limitation in Sections 4 and 5 of the Act which prohibits refunds below the level of the preexisting rate. (See, *infra*, 5-6; Pet. 16-17).

[2] See Pet. 13-16.

to become effective without refund obligation before the subject increase was submitted. Accordingly, under Section 4 of the Act, the Commission could order refunds only of the portion "received by reason of such [9.52-cent] increase" that it found excessive. *FPC v. Sunray DX Oil Co.*, 391 U.S. 9, 24. *Distrigas of Massachusetts Corp. v. FERC* ("DOMAC"), 737 F.2d 1208, 1224 (1st Cir. 1984). Any reduction below that level could be ordered only pursuant to Section 5 of the Act and could have prospective effect only from the date of the Commission's order.[3]

The Commission's argument that the regulation gives it authority not found in the statute appears based upon a premise that all PGA increases are subject to refund. Such a contention is contrary to Sections 4 and 5 of the Act and belies the Commission's own actions in accepting Arkla's PGA increases without suspension.[4] Moreover, there is nothing in the regulation that provides that each PGA filing is automatically suspended.[5] And, pursuant to

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[3] Winfield attempts to draw a distinction between rates that have been "accepted" by the Commission without contingency for refund and rates that have been "approved" after a hearing. (Winfield Br. 7-8). The distinction is without merit. Under Section 4 of the Act a filed rate that is not suspended or made subject to refund becomes the legal rate and a party "can claim no rate as a legal right that is other than the filed rate, whether it is fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951). No refunds or reparations may be ordered below the filed rate level. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578-579 (1981).

[4] In one instance the Commission initially suspended an Arkla PGA increase but subsequently, after further investigation, terminated the proceeding, thus making the PGA adjustment effective without refund obligation. When the Commission believes a PGA adjustment filing may be unjust and unreasonable, it is customary for the Commission to suspend the filing and make that filing subject to refund. See, Pet. 14, n. 20.

[5] Section 154.38(d)(4)(vi)(a) cited by the Commission only provides that the triennial filing shall be subject to refund, in this case the 9.52 cents per Mcf. Arkla does not dispute that fact.

Section 4(e) of the Act, the Commission may order refunds only after it has first suspended an increase.

It is in this context that the Commission's regulation violates *Sunray*, which unmistakably holds that:

> [I]t would be anomalous to treat an increased price as a trigger for a refund obligation which would leave the producer with a smaller net return than if it had never increased its price at all.[6]

This rationale is emphasized in *Distrigas of Massachusetts Corp. v. FERC*, 737 F.2d 1208 (1st Cir. 1984), where the court noted that this Court in *Sunray* reached its conclusion not only from the language of the Act, but also from the fact "that, otherwise, a firm asking for an increase could end up considerably worse off than if it had not requested one." 737 F.2d at 1224.[7]

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[6] The Commission suggests (Com. Br. 4, 11) that it was liberal in ordering a refund of only 12.64 cents per Mcf, implying that it could order a refund of the entire 90.62 cents of the PGA adjustments. Such an argument points up the fallacy of the Commission's position. It is simply inconceivable that the PGA regulation can be read as empowering the Commission to order refunds of all the PGA adjustments going back three years where the PGA adjustments have not been challenged and have been permitted to go into effect without suspension or refund obligation. Under the Commission's theory, Arkla could be denied recovery of its entire cost of service. Since Arkla must pass its purchased gas cost adjustments directly back to its suppliers, those funds are not available to Arkla and a requirement that Arkla "refund" the 90.62 cents would deny Arkla any recovery of the entire remainder of its cost of service. Since the validity of the entire three-year increase in PGA adjustments (90.62 cents per Mcf) is uncontested, the Commission requirement that Arkla refund 12.64 cents per Mcf more than the amount of its proposed increase, necessarily results in a retroactive reduction in recovery of a portion of the cost of service that the Commission had previously held to be just and reasonable.

[7] The Commission's attempt (Com. Br. 10, n. 5) to analogize a settlement agreement in DOMAC with an implied agreement on the part of Arkla here is specious. No such agreement, express or implied, can be imputed to Arkla on the facts of this case. Section 154.38(d)(4)(vi)(a) alluded to by the Commission as the source

Neither the Commission nor Winfield has faced up to the core issue whether the Commission may arrogate to itself the authority to do by its own regulation that which is proscribed by the Act. The reason, of course, is that there is no answer to such unwarranted assertion of power.[8]

II. Properly Interpreted, the PGA Regulation Does Not Authorize Refunds of Amounts in Excess of the Proposed Increase

The Commission seeks to bypass the retroactive refund issue with a contention that the triennial filing provides the Commission with the opportunity to scrutinize all of a pipeline's costs and revenues. (Com. Br. 8). But that analysis has nothing to do with the issue raised here, whether, after the Commission has completed the balancing of costs and revenues, there is a "floor" below which the Commission may not order refunds under Section 4 of the Act, as defined by *Sunray*.

Aside from the fact that the Commission cannot clothe itself with refund power proscribed by the Act, the language of the Commission's PGA refund provision, which is a regulation purporting to give effect to Section 4 of the Act, does not support the Commission's reading (Com. Br. 6).[9] In the case at hand, the Commission sus-

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of Arkla's agreement that its triennial filing is subject to refund greater in amount than the filed increase provides only that the triennial increase—9.52 cents per Mcf—was subject to refund.

[8] Winfield's contention that the issue has "received full consideration by four different decision-makers" (Winfield Br. 8) is inaccurate. Neither the ALJ, the Commission, nor the court below cited or referred to *Sunray* in the disposition of this proceeding. Each of the decision-makers below assumed the validity of the Commission's PGA regulations, without analysis of Arkla's express contentions that the PGA regulations exceeded the Commission's statutory authority as defined in *Sunray*.

[9] The Commission acknowledges that the regulation as adopted is different from the text of Order No. 452-A at 47 F.P.C. at 1511. See Opinion No. 160-A, Pet. App. 19a, n. 2.

pended Arkla's proposed increase of 9.52 cents, but did not, and at that time, could not, suspend the PGA adjustments that were being collected without refund obligation. Section 154.38(d)(4)(vi)(c) of the PGA regulation dealing with refunds of triennial filings provides only that a company shall, after balancing of costs and revenues, refund "any excess amounts *collected subject to refund.*" (Emphasis added).[10] Since only Arkla's 9.52-cent increase was subject to refund and the three-year accumulation of PGA adjustments were never suspended or made subject to refund, the refund requirement referred to in the regulation cannot reasonably be held to apply to the PGA adjustments. Subsequent language in the regulation which refers to a limitation on "[T]his refund obligation" refers directly back to the "amounts collected subject to refund," and in no way broadens the scope of Commission authority. See Pet. 16-17.

Moreover this reading of the regulation is consistent with the limitation in Sections 4 and 5 of the Act and *Sunray* which holds that the potential refund obligation is limited to "the amounts received by reason of such increase." 391 U.S. at 24. Read in terms of the Commission's limited refund authority as defined in *Sunray*, the regulation is not ambiguous as the Commission assumes (Com. Br. 6, n. 2) so that the Commission's asserted clarification is unnecessary and contrary to law.

III. Other Arguments of the Commission and Winfield Are Without Merit

Contrary to the position it takes before this Court (Com. Br. 9), the Commission in the *Florida Gas* case[11] told the Eleventh Circuit that *Florida Gas* is irrelevant to the issue presented in the case at bar. In its brief to the Eleventh Circuit the Commission represented that:

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[10] See Pet. App. 37a for full language of the regulation.

[11] *Florida Gas Transmission Co. v. FERC*, 741 F.2d 1307 (11th Cir. 1984).

> Petitioner's [Florida Gas] other arguments are equally without merit. These arguments, involving the filed rate doctrine, precepts against retroactive ratemaking, and the rule that the last clean rate places a limit on refund liability,[21] all beg the fundamental question presented in this case—whether the restated Base Tariff Rate included the Company's transportation rates. Given the Commission's finding that the Base Tariff Rate did include these rates, the arguments raised by the petitioner under these principles are beside the point.[12]

[21] *FPC v. Sunray DX Oil Co.*, 391 U.S. 9 (1968).

As the Commission stated in the quotation above, the issue raised in *Florida Gas* was whether the restated base tariff rate included the company's transportation rates as well as its resale rates. On this narrow issue, the Eleventh Circuit affirmed the Commission's holding that the base tariff rate is a composite of all rates, transportation as well as resale. The court did not cite nor address the *Sunray* decision, inasmuch as under the composite tariff rate holding, the issue of refunds of transportation revenues, separate and apart from the composite of all rates, did not arise. 741 F.2d at 1311. On the other hand, in the case at bar the issue is whether the Commission can nullify the *Sunray* doctrine by requiring Arkla to make retroactive refunds below 168.73 cents per Mcf, the firm rate in effect prior to Arkla's request for an increase.

Winfield notes (Winfield Br. 12) that in *DOMAC* the Commission limited refunds to an amount unaffected by any "tracking provisions." The reason for such a limitation by the Commission does not appear in the opinion, as no issue respecting any tracking provision was raised in

[12] Brief for Respondent, Federal Energy Regulatory Commission, *Florida Gas Transmission Co. v. FERC*, No. 82-6041, 11th Cir. at page 25.

that case. It may be noted however that DOMAC has a PGA clause in its tariff and that the First Circuit denied an intervenor's claim that the Commission could order refunds greater than the amount of the increase involved. 737 F.2d at 1222-1224. The existence of PGA increases did not provide a basis for further refunds. Applied to this case, *DOMAC* limits refunds to the 9.52 increase, exclusive of PGA adjustments.

CONCLUSION

The Interstate Natural Gas Association of America, ("INGAA") which represents virtually all major interstate natural gas transmission companies in the United States, nearly all of whom have PGA clauses in their tariffs, has filed a motion as *amicus* in this case in recognition that the opinion of the court below would adversely affect the entire interstate natural gas pipeline industry by nullifying *Sunray*.

For all the foregoing reasons and for the reasons stated in its petition, Arkla requests that a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit be granted.

Respectfully submitted,

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